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UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO

JENS ERIK SORENSEN, as Trustee of SORENSEN RESEARCH AND DEVELOPMENT TRUST,	) Case No. CV 07-05568 JSW
	)
	) <b>PLAINTIFF'S REPLY TO</b>
	) <b>DEFENDANTS' OPPOSITION TO</b>
Plaintiff	) <b>PLAINTIFF'S MOTION FOR</b>
v.	) <b>PARTIAL LIFT OF STAY AS TO</b>
	) <b>DEFENDANT LEGACY SUPPORT</b>
DIGITAL NETWORKS NORTH	) <b>SERVICES FOR PURPOSES OF</b>
AMERICA, INC., a Delaware	) <b>ENTERING DEFAULT</b>
corporation; LEGACY SUPPORT	)
SERVICES, LTD. d/b/a S2G; and DOES	) Date: June 13, 2008
1-100,	) Time: 9:00 a.m.
	) Courtroom 2, 17 <sup>th</sup> Floor
Defendants.	) Judge: Hon. Jeffrey S. White
	)
	)

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## SUMMARY OF REPLY

Neither Defendant has offered any reason why there should not be a partial lift of stay to deal with the issue of Defendant Legacy Support Services (“Legacy”)’s default.

Legacy seems eager to have the issue of its failure to file an answer resolved by the Court in light of its filing of a “Motion to Set Aside Any Appearance of Default” (Document # 51, et seq.). A partial lift of stay does not affect Defendant Digital Network North America, Inc. (“DNNA”) at all.

Therefore, the partial lift of stay requested by Plaintiff should be allowed.

## ADDITIONAL FACTS

Defendant Legacy Support Services never appeared in this case in any shape or form until April 30, 2008 by co-filing an Opposition to Plaintiff’s Motion for Partial Lift of Stay. *Kramer Decl.* ¶ 4.

The Order upon which Defendants contend that Legacy is entitled to rely was drafted by Defendant DNNA (compare Document # 27 proposed order with Document # 33 signed order) and explicitly defines “Defendant” in the Order as “Digital Networks North America, Inc.”

There has been no suggestion, formal or informal, written or oral, prior to the filing of Plaintiff’s Motion for Partial Lift of Stay that Legacy was represented by the same lawyers as DNNA or that any appearance or filings by DNNA were intended to have been made by Legacy. *Kramer Decl.* ¶ 5 and the entire court file in this case.

Defense counsel has misstated Ms. Kramer’s position on this matter by referencing her letter dated April 16<sup>th</sup> and Mr. Rohde’s response letter, but not including Ms. Kramer’s April 21<sup>st</sup> letter in which she corrected Mr. Rohde’s misstatements as follows. *Kramer Decl.* ¶ 6.

I am in receipt of your [Mr. Rohde’s] letter dated today. Apparently

1 you did not read my letter closely. It is not my contention that the Court  
2 made an error in its order, except to the extent that it did not correct a  
3 typographical error in the proposed order that DNNA sent to the Court.

4 Document # 33 is unambiguous in its identification of the "Defendant"  
5 as Digital Networks North America, Inc. and none other. See the first  
6 sentence. You simply cannot make a good faith argument that the  
7 typographical errors should be construed in favor of a defendant who  
8 made no appearance, but is currently represented by the same counsel as  
9 the party who drafted the order.

10 Furthermore, although you claim that Legacy relied on DNNA's  
11 typographical errors in that Order, there is no legitimate basis for that  
12 claim. The only way that argument would make sense was if your  
13 office was secretly representing Legacy in every document that it filed  
14 which explicitly and repeatedly represented itself as representing  
15 DNNA and only DNNA. I could not even find any reference to Legacy  
16 being noticed on any of DNNA's motions.

17 On the day of our phone conversation, I gave you the benefit of the  
18 doubt that you had just overlooked the specific context in which the  
19 Order in question was issued. It is now clear that you are, in fact, trying  
20 to make arguments that are unsupported by fact or law.

21 Let me again be clear. I consider it to be a Rule 11 violation for you to  
22 make an argument to the Court that contradicts every single written and  
23 oral representation, formal and informal, previously made to us and the  
24 Court regarding who your office represented and upon whose behalf  
25 arguments were made. If your office had any intention for DNNA's  
26 motions for extension, motion for stay, or resulting orders to accrue to  
27 the benefit of Legacy, you were grossly misrepresenting your intent at  
28 the time both to Plaintiff and to the Court.

I will expect you and your colleagues to drop this frivolous argument.

*Kramer Decl.*, Exhibit A.

Mr. Rohde has now stated, under oath, that its office was indeed (secretly)  
representing Legacy before January 13, 2008 (Rohde Decl. ¶ 4), though Mr. Rohde  
fails to identify how long before.

## ARGUMENT

### I. DEFENDANTS HAVE NOT SHOWN ANY REASON WHY THE PARTIAL LIFT OF STAY SHOULD NOT ISSUE.

Legacy seems eager to have the issue of its failure to file an answer resolved by the Court in light of its filing of a “Motion to Set Aside Any Appearance of Default” (Document # 51, et seq.). That motion cannot be heard unless Plaintiff’s Motion for Partial Lift of Stay is granted.

All discussion in the Opposition regarding why Legacy supposedly did not file an Answer should not be resolved until a partial lift of stay is entered.

A partial lift of stay does not affect Defendant Digital Network North America, Inc. (“DNNA”) at all and the Opposition filed with the Court does indicate that DNNA would suffer any prejudice or consequence.

Therefore, a partial lift of stay should be granted.

### II. LEGACY’S ARGUMENTS REGARDING THE PROPRIETY OF ENTRY OF DEFAULT MUST WAIT UNTIL THE REQUESTED PARTIAL LIFT OF STAY IS GRANTED.

Defendants’ opposition is filed with argument claiming that Legacy relied on a misleading “s” in an Order drafted by DNNA’s counsel, and claiming that Legacy has certain intentions regarding its defense. However, Legacy cannot argue the propriety of default or any of its newly claimed defenses unless and until the Court enters a partial lift of stay.

Indeed, Legacy is in violation of the stay order by filing a Motion to Set Aside Default without receiving leave of the Court to do so.

Although these matters were inappropriately argued in the Opposition document, Plaintiff will briefly address several of these points.

A. Defendant Legacy Has No Right To Rely On An “s” In An Order That Contradicted The Explicit Wording And Context Of The Order.

1 The true measure of a court order is not an isolated phrase appearing therein,  
2 but its effect when considered as a whole, and the same rules of interpretation apply  
3 as in ascertaining the meaning of any other writing. *Roraback v. Roraback*, 101 P.2d  
4 772 (Cal.App. 3 Dist., 1940); *Concerned Citizens Coalition of Stockton v. City of*  
5 *Stockton*, 26 Cal.Rptr.3d 735 (Cal.App.3.Dist.,2005); *Western Greyhound Lines v.*  
6 *Superior Court of Los Angeles County*, 331 P.2d 793, Cal.App.,1958

7 The proper construction of a court's decree is to be determined by an  
8 examination of issues made and intended to be submitted, and what decree was  
9 really designed to accomplish, rather than by seizing upon isolated parts of decree;  
10 and its scope is to be determined by what preceded it and what it was intended to  
11 execute. *N.L.R.B. v. Edward G. Budd Mfg. Co.*, 169 F.2d 571 (C.A.6,1948). See also  
12 *Hendrie v. Lowmaster*, 152 F.2d 83 (C.A.6.Mich.,1945) (the meaning of ambiguous  
13 judgment or order must be determined by what preceded it and what it was intended  
14 to execute); *Talman v. Talman*, 39 Cal.Rptr. 863 (Cal.App.2.Dist.,1964)

15 If language of a court order is uncertain, reference may be had to  
16 circumstances surrounding, and the court's intention in making, order. *Gardner v.*  
17 *Rich Mfg. Co.*, 158 P.2d 23 (Cal.App. 2 Dist.,1945); *Concerned Citizens Coalition of*  
18 *Stockton v. City of Stockton*, 26 Cal.Rptr.3d 735 (Cal.App.3.Dist., 2005). In  
19 construing an order, resort may be had to the notice of motion. *Western Greyhound*  
20 *Lines v. Superior Court of Los Angeles County*, 331 P.2d 793 (Cal.App., 1958).

21 The Order at Document # 33, begins with the following statement of definition  
22 – “Defendant DIGITAL NETWORKS NORTH AMERICA, INC. (“Defendant”) has  
23 moved . . . to enlarge time . . .” (Document # 33, page 2:1). This is consistent with  
24 Document # 28, the motion to which it referred, which refers to the moving party as  
25 DNNA at least 13 times and never refers to Legacy (see Document # 28,  
26 throughout). This is also consistent with the motion’s declaration (Document # 29)  
27 which refers to DNNA no fewer than 15 times, and never references Legacy.

28 After the initial definition, the Order again refers to a singular “Defendant” or

1 the singular possessive “Defendant’s” at lines 4, 5, 6, and 8. It is only at lines 11 and  
2 12 that it switches to “Defendants’ ” and “Defendants.”

3 The only logical interpretation of that Order is that it was intended to cover  
4 DNNA and only DNNA. Legacy had no part of it.

5 There is no evidence that Legacy “relied” upon the two inconsistent “s”-s.  
6 There is only a declaration of Legacy’s counsel who drafted the Order with the  
7 inconsistent language and context. Legacy cannot rely on a misrepresentation made  
8 to the Court and Plaintiff’s by its counsel.

9  
10 B. There Is No Good Cause To Set Aside Legacy’s Default.

11 Concurrent with the filing of the Opposition to the Motion for Partial Lift of  
12 Stay, Legacy filed a motion for “Motion to Set Aside Any Appearance of Default.”  
13 That filing is in violation of the stay in this case because it was not accompanied  
14 with any request for the Court to lift the stay. Legacy is trying to “have its cake”  
15 (not participating in litigation) and “eat it too” (file motions before filing an answer).

16  
17 1. *Legacy and/or Its Attorneys Engaged In Culpable Conduct That  
18 Lead To Legacy’s Default.*

19 There is no evidence before the Court from anyone at Legacy to indicate that  
20 they were either aware of DNNA’s motions or resulting orders, or relied upon them.  
21 There is only the statement of attorney Mr. Rohde saying that Legacy believed this  
22 or relied on that. Mr. Rohde is not a competent witness on this factual question. See  
23 *Evidentiary Objection* filed concurrently herewith.

24 The Order that is argued to be Legacy’s basis for reliance explicitly is limited,  
25 by its own terms to DNNA, and was drafted by defense counsel. If defense counsel  
26 was aware of the typographic error added “s” to Defendants at the time and told  
27 Legacy that it was a basis for not answering, defense counsel is demonstrating  
28 serious lack of candor with the Court and Plaintiff.



1 If Legacy wanted a delay in filing its answer, it should have filed it along with  
2 DNNA. It did not do so. If Legacy wanted a stay, it should have requested one or  
3 joined DNNA's request. It did not.

4 Sorensen's counsel was unaware of the typographical error at the time the  
5 Order was served. It is disingenuous for defense counsel making a typographical  
6 error in a proposed order submitted on behalf of one defendant (DNNA) to suggest  
7 that the plaintiff had an affirmative obligation to notify its other client (Legacy) of its  
8 own error.

9  
10 2. *No One Knows What Legacy's Proposed Defenses Are Until They  
File An Answer.*

11 Legacy claims that it will vigorously defense this action, and that it claims the  
12 subject patent is invalid, however, it has not filed any Answer. Legacy cannot make  
13 empty claims outside of the context of proper procedure.

14 Fed.R.Civ.P. Rules 8 and 12 sets forth how a defendant is required to respond  
15 to a complaint and summons served on the defendant. Legacy has done nothing in  
16 compliance therewith, has violated the existing stay, and yet wants to receive  
17 affirmative relief from the Court. Such blatant disregard for even the most basic  
18 procedures should not be rewarded.

19  
20 3. *Disregard for the Obligations of a Party to Respond to a  
Complaint Will Prejudice Plaintiff.*

21 Legacy was properly served with a summons and amended complaint and  
22 obviously made an affirmative decision to not defend. It did not file a timely answer,  
23 did not request an extension of time to respond, did not request stay. It did nothing.  
24 Even now, when its default has been brought to the attention of the Court, Legacy  
25 has not offered to Answer the complaint, and merely sets forth a frivolous argument  
26 claiming reliance on an out-of-context "s" that its attorneys full well knew did not  
27 make an Order applicable to Legacy, and violates the existing stay by filing a motion  
28

1 for relief without leave of Court.

2 Plaintiff is required to abide by the Federal Rules of Civil Procedure; so must  
3 the Defendants.

### 4 CONCLUSION

5 For the reasons set forth in Plaintiff's motion and above, and in light of  
6 Defendants' lack of any reason to not grant the relief requested, the Court should  
7 exercise its inherent authority to grant an exception to the stay entered on January 16,  
8 2008 for the following limited purpose:

9 Requesting and entering default against defendant Legacy Support  
10 Services, Ltd. ("Legacy"), a party that defaulted just days prior to entry  
11 of the stay order.

12 Legacy has affirmatively, and in violation of the stay, filed a motion for relief  
13 from default. Such motion cannot be considered until the Court grants the relief  
14 requested by the Plaintiff.

15 Wherefore, Plaintiff again respectfully requests the Court to grant a partial lift  
16 of stay for the limited purposes of obtaining entry of default, a damages prove-up  
17 hearing, and entry of a default judgment against Defendant Legacy Support  
18 Services, Ltd.

19 //

20 //

21 //

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25 //

1 DATED this Wednesday, May 07, 2008.

2  
3 JENS ERIK SORENSEN, as Trustee of  
4 SORENSEN RESEARCH AND DEVELOPMENT  
TRUST, Plaintiff

5 /s/ Melody A. Kramer

6 J. Michael Kaler, Esq.  
7 Melody A. Kramer, Esq.  
8 Attorneys for Plaintiff  
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**PROOF OF SERVICE**

I, Melody A. Kramer declare: I am and was at the time of this service working within in the County of San Diego, California. I am over the age of 18 year and not a party to the within action. My business address is the Kramer Law Office, Inc., 9930 Mesa Rim Road, Suite 1600, San Diego, California, 92121. I am a member of the State Bar of California and the Bar of this Court.

On May 7, 2008, I served on the parties to this action the following documents:

**PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL LIFT OF STAY AS TO DEFENDANT LEGACY SUPPORT SERVICES FOR PURPOSES OF ENTERING DEFAULT**

**DECLARATION OF MELODY A. KRAMER IN SUPPORT OF PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL LIFT OF STAY AS TO DEFENDANT LEGACY SUPPORT SERVICES FOR PURPOSES OF ENTERING DEFAULT**

**EVIDENTIARY OBJECTION TO DECLARATION OF KURT W. ROHDE (DOCKET #49)**

<b>PERSON(S) SERVED</b>	<b>PARTY(IES) SERVED</b>	<b>METHOD OF SERVICE</b>
Theodore K. Bell tad.bell@pillsburylaw.com Daniel J. Richert Daniel.richert@pillsburylaw.com Pillsbury Winthrop et al 2475 Hanover Street Palo Alto, CA 94304-1114 650-233-4545 FAX	Defendant Digital Networks North America, Inc. Legacy Support Services, LTD.	Email – Pleadings Filed with the Court
Kurt W. Rohde rohdek@mbhb.com 300 South Wacker Drive Chicago, IL 60606-6709	Defendant Digital Networks North America, Inc. Legacy Support Services, LTD.	Email – Pleadings Filed with the Court

☐ (Personal Service) I caused to be personally served in a sealed envelope hand-delivered to the office of counsel during regular business hours.

☐ (Federal Express) I deposited or caused to be deposited today with Federal Express in a sealed envelope containing a true copy of the foregoing documents with fees fully prepaid addressed to the above noted addressee for overnight delivery.

1  
2 ☐ (Facsimile) I caused a true copy of the foregoing documents to be transmitted by  
3 facsimile machine to the above noted addressees. The facsimile transmissions were  
4 reported as complete and without error.

5 ☐ (Email) I emailed a true copy of the foregoing documents to an email address  
6 represented to be the correct email address for the above noted addressee.

7 ☒ (Email--Pleadings Filed with the Court) Pursuant to Local Rules, I electronically filed  
8 this document via the CM/ECF system for the United States District Court for the  
9 Southern District of California.

10 I declare that the foregoing is true and correct, and that this declaration was executed on  
11 Wednesday, May 07, 2008, in San Diego, California.

12 /s/ Melody A. Kramer

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14 Melody A. Kramer  
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